BRIEF FOR APPELLANT.

C. W. Burns,
For Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 24.

THE NORTHERN PACIFIC RAILWAY COMPANY,
Appellant,

vs.

THE AMERICAN TRADING COMPANY.

BRIEF FOR APPELLANT.

STATEMENT.

By the decree in a foreclosure suit, in the Circuit Court of the United States for the Southern District of New York, against the Northern Pacific

Railroad Company, the Northern Pacific *Railway* Company, the purchaser of the mortgaged property, was required to pay all obligations or liabilities contracted or incurred by the Court's Receivers. The American Trading Company intervened in that suit and asks, by virtue of the said decree, that the Northern Pacific Railway Company be required to pay damages for the failure of the Receivers to perform a contract for the transportation of goods.

The case was tried upon an agreed statement of facts (Transcript, p. 14) by which it appears:

The Receivers under the order of the court were authorized to continue and were continuing the business of the Northern Pacific Railroad Company, *i. e.*, of the company chartered by the act of Congress of July 2, 1864. Their railroad extended from Duluth, Minnesota, to Tacoma, Washington. They had contracts with various carriers for through billing to and from points not on their line. One of such carriers was the Northern Pacific Steamship Company, which was an English company operating a line of steamers between Tacoma and points in Japan and China, including Yokohama. The contract between the Steamship Company and the Receivers was one originally made between the Steamship Company and the Railroad Company and by leave of court adopted by the Receivers; a copy is annexed to the statement of facts Exhibit A, p. 23, Transcript. The Receivers held no stock in the Steamship Company and there is no proof of any relations between them

and it, other than such as appear by the contract (Transcript, p. 14).

By this agreement the Receivers and their agents in the United States were made agents of the Steamship Company for the purpose of making through rates and issuing through bills of lading TO Asiatic ports (Transcript, p. 26), and the Steamship Company and its agents were similarly agents of the Receivers in Asia as to shipments FROM its ports (Transcript, p. 25).

The Receivers had an office in the city of New York in charge of George R. Fitch, called "General Eastern Agent," and he made arrangements for the transportation of freight upon the Receivers' railroad and its connections, including transportation to China and Japan. Fitch's only authority to act as agent of the Steamship Company was that arising under the contract, Exhibit "A." He never received any direct or independent appointment from the Steamship Company. He knew that an arrangement had been concluded between the Receivers and the Steamship Company, by which contracts for through shipment to Yokohama might be made and through bills of lading issued by the Receivers' agents, and he had been instructed by the Receivers to solicit freight for through transportation upon bills of lading of which Exhibit "C" (opposite p. 29, Transcript) is a copy. Fitch did not know the terms of the contract between the Steamship Company and Receivers, and the Trading Company did not know what corporation operated the steamships, or that the Steamship Com-

pany was separate and independent, or that there was any contract between the Receivers and that company (Transcript, p. 15).

Fitch had no express authority to make any contract for through transportation, except the contract stated in the bills of lading. The Trading Company did not know the terms of his express authority (Transcript, p. 15).

The Trading Company is a corporation organized under the laws of Connecticut, having its principal office in the city of New York, and was engaged in carrying on a general commercial business with Asiatic ports (Transcript, p. 15).

In September, 1894, it applied to Fitch for a rate upon a proposed shipment of about two hundred tons of pig lead from New York to Yokohama, informing Fitch that it was of vital importance that the lead should go forward by the earliest steamer, in order to enable the Trading Company to fulfil a proposed sale of the lead in Japan. Fitch thereupon named a rate and undertook to forward the lead from New York on or before September 29th and from Tacoma via the Northern Pacific steamer "Tacoma," sailing October 30 (Transcript, p. 15).

Thereupon the Trading Company cabled its agents at Yokohama naming a price and date at which the lead could be delivered there, and its agents made a sale, voidable at the option of the purchaser in case of extraordinary delay. Neither the Receivers nor Fitch knew until September 24 that any such contract had been made and they never had any information of its particular terms.

Upon concluding the contract of re-sale in Japan, the Trading Company bought two hundred tons of lead of the Balbeck Smelting and Refining Company of Newark, New Jersey (Transcript, p. 16).

On September 19 Fitch wrote to claimant, quoting a rate for the lead "to be forwarded from New York on or before Sept. 29th in accordance with shipping instructions given you by me, and to be forwarded from Tacoma, Wash., *via* Northern Pacific steamer, sailing from thence October 30th." This was accepted by claimant's letter of September 20 (Transcript, p. 16). On September 22 Fitch wrote giving routing (Transcript, p. 17).

War between Japan and China then existing, Fitch, before naming a rate, expressed doubt as to whether lead might not be excluded from transportation as contraband. Shipment of lead was not prohibited by the United States during this war, and on September 25 claimant made a shipment via San Francisco, which went through without delay. Various telegrams between Fitch and the Receivers' general offices at St. Paul relating to the making of the rate are inserted in the statement of facts, one of which dated September 22 stated, that the steamship company declined to handle lead, and directed Fitch to cancel his quotation. Fitch accordingly did so, and on September 24 claimant wrote him threatening to hold "your company" responsible for any damage. Thereupon further telegrams passed, and the refusal to accept the shipment was withdrawn (Transcript, pp. 18-19).

The lead was shipped September 27 at Newark by the Anchor line to Duluth, received at Duluth by the Receivers' railroad and transported in due time to Tacoma.

On September 28, a shipping receipt or bill of lading was issued by the Anchor Line, Newark to Duluth (Exhibit B, Transcript, p. 28), and was forthwith surrendered by claimant to Fitch, who issued in place of it a bill of lading in the usual form, Newark to Yokohama, a copy of which is annexed to the statement of facts (Exhibit "C," Transcript, p. 29). No objection was made to its terms by claimant and none of its officers or clerks examined its terms. Claimant immediately hypothecated it with the Hong Kong and Shanghai Bank as collateral security for money borrowed (Transcript, pp. 20-21).

On September 28 a check for the freight from *Newark to Yokohama* was given by claimant to Fitch and deposited by him to his account as agent. This was the first shipment which claimant had ever made on the line of the Northern Pacific and connecting carriers (Transcript, pp. 19-20).

In prominent type in the heading of the bill of lading was the following:

"THE NORTHERN PACIFIC RAILROAD CO.
IN CONNECTION WITH
THE NORTHERN PACIFIC STEAMSHIP CO."

By its terms the freight was receipted for by the Railroad Company "to be carried to the port of Tacoma, Wash., and thence by NORTHERN PA-

CIFIC STEAMSHIP COMPANY'S STEAMER 'Tacoma' to the port of Yokohama."

The contract states separate terms for the transportation on the land and on the sea. In the conditions respecting service on land it is stated (subdivision 3 of conditions):

> "No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee."

(Subdivision 12 of conditions):

> "This contract is executed and accomplished and all liability hereunder terminates, on the delivery of the said property to the steamship, her master, agent or servants, or to the steamship company, or on the steamship pier at the said port, and the inland freight charges shall be a first lien, due and payable by the steamship company."

The bill of lading was subscribed in the following form:

> "IN WITNESS WHEREOF, The Agent signing on behalf of the said THE NORTHERN PACIFIC RAILROAD COMPANY, and of the said NORTHERN PACIFIC STEAMSHIP COMPANY, severally, and not jointly, hath affirmed to three Bills of Lading all of this tenor and date, one of which Bills being accomplished, the others to stand void.
>
> Dated at New York this 28th day of September, 1894.
>
> GEO. R. FITCH,
> G. E. Agent on behalf of carriers severally but not jointly."

On September 29, Fitch wrote the agents of the Steamship Company a letter inclosing a copy of the bill of lading, and stating that he had guaranteed delivery by steamer sailing October 30. Of this letter claimant had no knowledge.

At Tacoma the lead was delivered by the Receivers to the Steamship Company and loaded upon the "Tacoma," which was due to sail October 30; but at about 4 P. M. of that day the Deputy Collector of the United States at Tacoma refused to clear the vessel while the lead was on board, on the ground that it was contraband of war, and telegraphed the Collector at Port Townsend for instructions. On the day following the Collector answered as follows:

> "Department advises that unless you have evidence tending to show that the pig lead now at Tacoma and referred to in your telegram of yesterday is to be used in the war between China and Japan, no reason is perceived why shipment should not be permitted."

In the meantime the master of the vessel had unloaded the lead, which delayed the ship until 9 A. M. the morning of October 31, when he sailed without it.

The Trading Company was not notified of this until November 5 (Transcript, p. 22).

The next vessel in the line was the "Sikh," a chartered ship not belonging to the Steamship Company. Her captain declined to take the lead on the ground that it was contraband, and the owners of the ship in London, being cabled to by the

Steamship Company, adhered to the captain's position (Transcript, p. 22).

The lead went forward on the next vessel, the "Victoria," December 11, and arrived in Yokohama January 4, 1895, instead of on or about November 18, 1894, when it would have arrived had it gone forward October 30 (Transcript, p. 22).

In the meantime hostilities between China and Japan had ceased, the price of lead had fallen and the purchaser refused to carry out his contract in consequence of the delayed delivery. The price at which he bought was $38,610.17, and the Trading Company resold for $11,331.60, the best price then obtainable. The difference, $26,704.02, with interest, is claimed as damages in this proceeding (Transcript, p. 22).

The case was decided in the Circuit Court by Judge Wheeler, who dismissed the petition, holding that the delay was due to the act of a government officer, over which the carrier had no control (Transcript, p. 29-31).

This decision was reversed by the Circuit Court of Appeals and damages awarded against the Railway Company. The opinion of the court will be found at p. 40-46 Transcript.

This court has jurisdiction of the appeal. This was an intervention in a foreclosure suit, in which suit the jurisdiction by the Circuit Court rested on a federal question (Transcript, p. 2); *Union Pacific Ry. Co. v. Harris*, 158 U. S. 326; *Northern Pacific R. R. Co v. Amato*, 144 U. S. 465. The jurisdiction over interventions is referable to the jurisdiction

of the main suit; *Pope v. Louisville, New Albany & Chicago Ry. Co.*, 173 U. S. 573, and cases cited. Therefore the judgment in the intervention proceeding is appealable to this court, as the judgment in the main suit would have been.

Assignments of Error.

Errors are duly assigned in the record (Transcript, pp. 48-9).

The following propositions are included in the assignments of error and will be urged:

1. *The record does not show any agreement that the Receivers would assume responsibility for the transportation beyond the line of railway in their charge.*

2. *There is no proof that the court had authorized the Receivers to assume such responsibility, and they could not do so without such authority.*

3. *If Fitch made such an agreement it was not within his authority, real or apparent.*

4. *The bill of lading is the controlling contract, and by its terms the Receivers were not liable beyond their own line.*

5. *The damages were caused solely by the act of the Collector, representing the authority of the United States, and the Receivers are not liable for damages so caused.*

ARGUMENT.

I.

Inasmuch as the damages sued for were due solely to delay after the goods had been delivered by the Receivers to the connecting carrier, the first question confronting us is, whether the Receivers were responsible for such damage. In order to establish their reponsibility, it must appear (a) that Fitch made in fact an agreement that the Receivers should be responsible for the whole transportation from Newark to Yokohama; (b) that such agreement was within the scope of his authority, and (c) that the Receivers themselves could lawfully make such a contract.

Therefore the first and one of the most important questions in the case is, whether the testimony proves that Fitch in fact made a contract that the

Receivers should be responsible for the whole distance. This question received very scant consideration by the learned Circuit Court of Appeals (Transcript, p. 43-4).

Mr. Justice Field, delivering the unanimous opinion of this court in *Myrick v. Michigan Central R. R. Co.*, 107 U. S. 102, lays down the rule which must be applied to the testimony in this case:

> "The general doctrine, then, as to transportation by connecting lines, approved by this court, and also by a majority of the state courts, amounts to this: That each road, confining itself to its common law liability, is only bound, in the absence of a special contract, to safely carry over its own route and safely to deliver to the next connecting carrier, but that any one of the companies may agree that over the whole route its liability shall extend. In the absence of a special agreement to that effect, such liability will not attach, and *the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence.*"

The same doctrine is illustrated and applied in the well considered cases of *Taylor v. Maine Central Railroad*, 87 Me. 302; *Burroughs v. Norwich & Worcester Railroad*, 100 Mass. 26, Gray, J.; *Washburn & Moen Mfg. Co. v. Providence & Worcester R. R. Co.*, 113 Mass. 490.

The claimant seeks to establish an agreement which is unusual, and this he must show by "clear and satisfactory evidence," and no "doubtful expressions or loose language" will suffice. Was there any clear, special contract that the *Receivers* should carry beyond Tacoma or that *they* should

carry or guarantee the carriage by any special boat?

In determining this question it is not necessary to consider any verbal communications between the claimant and Fitch, and our attention may be confined to the Fitch letter of Sept. 19, 1894 (Transcript, p. 16). This unquestionably supersedes any previous oral communications, and such must be the view of the claimant, because in its letter dated September 24 (Transcript, p. 18) it advised Fitch, after he had proposed to decline taking the shipment as contraband, that it would hold the company under "your contract with us under date Sept. 19th, and confirmed by us under date Sept. 20th."

Considering that this sort of a contract cannot be made out by inference, or "from doubtful expressions or loose language," and that it must appear from "clear and satisfactory evidence," the letter of Fitch is very far from showing any agreement on the part of the Receivers with respect to transportation beyond Tacoma. Fitch confirms a rate and specifies how and when the property shall go through. He says, "to be forwarded from New York on or before Sept. 29th, in accordance with shipping instructions given you by me and to be forwarded from Tacoma, Wash., *via* Northern Pacific steamer sailing from thence October 30th." There is no guaranty nor promise in terms that the Receivers should do anything beyond their own line. He no doubt agreed that the Receivers should perform their part of the transportation, that is get the shipment to Tacoma in time for the steamer

mentioned; but that the Receivers guaranteed performance by other carriers, or that they assumed responsibility for a connecting carrier taking the goods on a particular steamer, is a proposition, which cannot be made to appear clear and beyond controversy from the language of the letter. The letter is no more a special contract that the Receivers would carry beyond their line than were the receipts issued by the carriers in some of the cases above cited.

And the rule of the Myrick decisions should in the case of receivers be most strictly adhered to. Especially should the court hesitate to find upon such evidence as this letter, that the receivers of a court agreed to carry beyond the line being administered by the court.

Claimant relies upon the fact that it informed Fitch of the necessity that the load should go forward at the date indicated. But this proves nothing. For the sake of the argument it might even be conceded that he agreed for the Stewardship Company that the freight should be carried by a certain steamer. But claimant must show, not only a special agreement made by Fitch to carry by a particular boat to Yokohama, but that he agreed this for and on behalf of the Receivers, and undertook that they should be responsible for that part of the transportation to be performed by connecting carriers.

Claimant calls special attention to the letter of Fitch dated Sept. 29 (Transcript, p. 21) in which he says: "I have made contract guaranteeing deliv-

ery of this shipment at Yokohama by our S. S. "Tacoma sailing October 30th;" but suppose he had so contracted, the question is, for whom? The letter in which this statement was made was written to the Steamship Company. He was in fact acting for two principals. Like the agent in *Washburn & Moen Mfg. Co. v. Providence & Worcester Ry.*, *supra*; and the plaintiff must establish that he made the alleged guaranty on behalf of the Receivers.

The claimant should have known that Fitch was acting for several principals, and must be held, so think, to have known it. It is a corporation having a principal office in New York and carries on a general commercial business with foreign ports (Testimony, p. 15). The shipment in question was a very large one, and about the same time claimant made a similar shipment to Japan via San Francisco (Testimony, p. 17). Being a corporation engaged in general trade to foreign ports does not suggest that its officers are ignorant of the routes of the customs of shipping; and that its officers have there were more carriers than the Receivers is evident at the outset. For claimant started the shipment by the Pennsylvania Railway and the Ocean line, which carried it from Newark to Duluth a thousand miles before it reached the Receivers' railway; the claimant obtained a receipt of the Ocean line (Exhibit "B") and forthwith surrendered it to Fitch for the bill of lading (Exhibit "C").

The claimant therefore knew that other carriers than the Receivers were concerned in Fitch's con-

Washburn & Moen Mfg. Co. v. Providence & Worcester Ry., supra). It knew the essential fact that Fitch was a general agent of more than one carrier, for it shipped by the Pennsylvania and Anchor line and paid the freight for that shipment to Fitch. Suppose the loss had occurred on the Pennsylvania railway or on the Lakes, could the claimant have held the Receivers? We think not, for the case would come precisely within the decided cases before cited.

As the claimant knew *some* other carriers were represented by Fitch, they should have inquired, if interested, what others. And as shippers of experience in the Asiatic trade, they were bound to know that no one railway company formed by its own line alone a through route from United States shipping points to Asia. The corporate name Railway Company *prima facie* negatives the idea that such a corporation owns and operates a ship line across the Pacific. The act of Congress incorporating the Northern Pacific Railroad Company gave that company no such authority, and it is to say the least doubtful if it could have exercised it. The claimant does not assert that it supposed or believed the Receivers owned or operated the ship line, or that any such appearance or inducement was held out to them. The record shows that it knew nothing on the subject and did not inquire (Transcript, p. 15).

II.

The only proof of the authority of the Receivers is, that they were authorized by the court to continue and were continuing to carry on the business of the railroad in their charge (Transcript, p. 14). There is no proof that the court had authorized them to transport goods beyond their own line, or guarantee the transportation thereof by other carriers, and in the absence of such authorization we submit that such contracts were beyond their power.

The general rule as to the power of receivers is stated by this court in the opinion delivered by Mr. Justice Jackson in *Chicago Deposit Vault Co. v. McNulta*, 153 U. S. 554:

> "It is undoubtedly true that a receiver, without the previous sanction of the court, manifested by special orders, may incur ordinary expenses or liability for supplies, material or labor needed in the daily administration of railroad property committed to his care as an officer of the court; but it seems equally well settled that the courts decline to sanction the exercise of this discretion on the part of receivers in respect to large outlays, or con-

> tracts extending beyond the receivership, and intended to be binding upon the trust. The receiver being an officer of the court, and acting under the court's direction and instructions, his powers are derived from and defined by the court under which he acts. He is not such a general agent as to have any implied power, and his authority to make expenditures and incur liabilities—like the one in question—must be either found in the order of his appointment, or be approved by the court, before they acquire validity, and have any binding force upon the trust."

The ordinary and usual business of the railroad company the Receivers had the right to do, but it appears from *Myrick v. Michigan R. R. Co.*, *supra*, that contracting for transportation beyond its own line is an unusual and extraordinary service, not, according to American law, pertaining or belonging to the duties of a common carrier, but requiring a special and express contract. Therefore the making of such guaranties is no part of the necessary, or even the usual, business of operating a railroad, and does not come under the authority of Receivers as defined in the McNulta case. *International & Great Northern R. R. Co. v. Wentworth*, 87 Texas, 311.

There can, we submit, be no more ground for saying that the Receivers could lawfully guarantee the performance of service by the ocean carrier between Tacoma and Yokohama,than for holding that the Receivers themselves could buy or charter ships and by their operation transport the freight themselves, or that they could guarantee the earnings of ships operated by others. And will it be con-

tended for a moment that the Receivers, under the ordinary power to operate this railroad, could have set up a steamship line across the Pacific ocean and subjected the trust fund in their charge to the risks and liabilities of such an enterprise, or that they could have guaranteed earnings to the Steamship Company? See *Green Bay & Minnesota Railroad v. Union Steamboat Co.*, 107 U. S. 98; *Railway Companies v. Keokuk Bridge Co.*, 131 U. S. 371, 385; *Swift v. Pac. Mail Steamship Co.*, 106 N. Y. 206, 216-17.

III.

However Fitch acted, and whatever the ideas of himself or claimant upon the subject, if he did make any engagement on behalf of the Receivers for carriage of the goods beyond Tacoma, he exceeded his authority.

It is admitted that he had no special authority to make such a contract. It is also admitted that he had no express general authority to make contracts for through transportation except as pro-

vided by the bills of lading (Transcript, p. 15). The bill of lading (Exhibit "C") is signed by him for the carriers severally and not jointly, and contains the provision that

> "No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route" (paragraph 3 of Conditions),

and that all responsibility of the carrier to Tacoma ends on delivery to the vessel there (paragraph 12 id.).

Therefore, Fitch had actually no power to make the Receivers liable except upon their own line.

If, then, the Receivers are to be held bound by his agreement rendering them liable for damages resulting from matters not occurring on their line, it must be because they invested their agent with an apparent authority in excess of his real authority. Nothing of the sort appears here.

The only circumstances which could possibly be pointed to as authorizing a belief that Fitch had authority to bind the Receivers by a guaranty of the conduct of their connecting carriers are, that he was their General Eastern Agent, that he wrote upon letter paper bearing a heading which announced only that he was *their* agent, and that he signed his name with the addition "G. E. A."

As to the first of these circumstances, it does not appear at all what are the usual powers of a General Eastern Agent of a western carrier, or even whether there can be said to be any such usual powers. It does appear from the telegrams which passed between him and the superior employes of

the Receivers (Transcript, pp. 17-19) that his authority was, in fact, very limited, and that he could not even name a rate to Asia without special authorization. Not a circumstance appears to justify a belief on the part of claimant that his authority was anything more than it actually was. Claimant's officers may have believed so, but they had no right to believe so from the mere fact that he was called "General Eastern Agent" of the Receivers.

It is familiar law, that one who deals with an agent is bound to inquire as to the extent of his authority, and acts at his peril if he does not inquire. This case is a particularly strong illustration of the propriety of this rule. Had claimant inquired, it would have appeared, that Fitch neither supposed himself authorized to bind the Receivers as to any transportation beyond their lines, nor had any idea of doing so. The bill of lading which he subsequently issued plainly shows this. Fitch certainly did not suppose that in issuing this bill of lading he was departing from his original agreement. His correspondence with the Steamship Company's agents (Transcript, p. 21) shows, that they and he considered he was acting as agent for that company for the carriage beyond Tacoma. All this claimant would have discovered had it made the slightest inquiry.

Nothing was done either by Fitch or by the Receivers to indicate that his authority was at all greater than it really was. He appeared to be the General Eastern Agent of the Receivers, and

he was. He appeared to be authorized to represent them to some extent in arranging for shipments over their railroad, and he was so. What his powers were in no way appeared, nor had anybody any right to infer from what appeared that he had broad powers. He had no power to make an undertaking *for the Receivers* to carry over any line except the railway in their hands, and he did not appear to have any.

It is a practice so common that we submit the court must take notice of it, for an agent, primarily appointed by one of several connecting carriers, to make agreements for the through carriage of freight, acting as agent for each carrier for its own part of the route. That he is called agent of one company or carrier, or of another, neither means, nor indicates that that particular carrier assumes responsibility for the entire transportation. Indeed, this is held in the cases which adhere to the rule of *Myrick v. Michigan Central R. R.*, and is one of the fundamentals of the American law as distinguished from the English. In this is solid ground for holding any large shipper of wide experience bound to apprehend that Fitch would represent several principals in a contract for transportation from Newark to Yokohama.

The learned court below cited and applied to this case decisions upon the apparent authority of a "General Freight Agent." But he is frequently and commonly the head of the freight department. And the assumption that the apparent authority of the "General Eastern Agent" of a western railroad has apparent powers co-extensive with those of a "General Freight Agent" is unwarranted by anything before the court.

IV.

It appears that the goods were shipped from Newark on the 27th of September, and the Balbeck Smelting & Refining Company (the shippers) received at Newark from the Anchor line the receipt or bill of lading marked Exhibit "B." This instrument states that the goods were received on the 28th. The Balbeck Company delivered it to the Trading Company, which *forthwith* surrendered it to Fitch, who on Sept. 28 (the same day), issued a bill of lading in the *usual form* (Transcript, p. 20). This bill of lading was not read by the officers of the Trading Company, but was immediately negotiated to the Hong Kong and Shanghai Bank for money borrowed. It is evident that the Trading Company throughout the whole negotiation expected to receive a bill of lading from Fitch, upon which they could borrow money. It is also evident that the bill of lading was issued as soon as practicable after the goods were delivered and that it *could* not

have been issued earlier. Upon these facts we insist that the bill of lading expresses the only contract covering the rights of the parties; and that the plain agreement of the bill of lading, that the Receivers should not be liable beyond their terminus at Tacoma, is a part of that contract; *Seitz v. Brewers Refrigerator Co.*, 141 U. S. 510; *De Witt v. Berry*, 134 U. S. 306.

The learned Circuit Court of Appeals as to this point held that the bill of lading did not control, because the goods were shipped before its issue, relying on *Missouri Pacific Railway Co. v. Beeson*, 30 Kansas, 298; *Swift v. Pacific Mail Steamship Co.*, 106 N. Y. 206; *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318; *Gaines v. Union Trans. & Ins. Co.*, 28 Ohio St. 418; *Bostwick v. B. & O. R. R. Co.*, 45 N. Y. 712.

In *Missouri Pacific Railway Co. v Beeson*, the proof was of a shipment for transportation without limitation of liability, where after the goods had left the shipper signed a paper, claimed to limit the liability, which he could not well read and did not read, but which he supposed to be a receipt.

In *Swift v. Pacific Mail Steamship Co.*, the shipper did not apply for a bill of lading, but it was mailed to him two months after the shipment and not received until after the goods were on the ocean and the damage had occurred. The court held (106 N. Y., p. 219):

> "The defendants could not, therefore, abrogate or alter that contract by merely signing

> and mailing bills of lading, which did not reach the plaintiffs until after the oil had left Aspinwall, and much, if not all, the loss had occurred. There certainly was no conclusive evidence that the plaintiffs consented to accept the bills of lading in place of the prior contract, and that contract must, therefore, control."

In *Bostwick v. Baltimore & Ohio Railroad Co.*, the preliminary agreement was that the goods should be shipped to New York all rail, and a higher rate of freight was paid for that agreement. The goods were in fact shipped partly by water. The court said (p. 716):

> "If the plaintiff had expressly assented to the terms of the bill of lading subsequently delivered to him, such assent would operate as a change of the terms of the contract originally made and under which he had parted with his property. But after the verbal agreement had been consummated and rights had accrued under it, the mere receipt of the bill of lading, inadvertently omitting to examine the printed conditions, was not sufficient to conclude the plaintiff from showing what the actual agreement was under which the goods had been shipped."

The case of *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318, does not bear upon the subject. The point decided was that a carrier could not limit his common law liability by an unsigned general notice on the back of a receipt.

In the case of *Gaines v. Union Trans. & Ins. Co.*, the point involved was the right of a carrier to limit its common law liability by a bill of lading handed to the shipper and not examined.

In *Shelton v. Merchants Despatch Trans. Co.*, 59 N. Y. 258, it was held that a bill of lading was binding although issued after the shipment, when it was issued in accordance with the habitual mode of doing business between the shipper and the carrier.

In *Hill v. Syracuse, Binghamton & N. Y. R. R. Co.*, 73 N. Y.351, the court holds what is very obviously a sound proposition, that the delivery of the property and of the bill of lading are generally regarded as simultaneous acts, although usually the delivery of the property necessarily precedes the making out and issuance of the bill of lading, and in most cases some parol negotiations precede the delivery of the property. Same rule decided in *Germania Fire Ins. Co. v. Memphis & Charleston R. R. Co.*, 72 N. Y. 90.

In *Rubens v. Ludgate Hill Steamship Company*, 20 N. Y. Supp. 481, where the bill of lading was not issued until after shipment, the court said:

> "We think it equally well established that, though in this case there was no evidence that the bill of lading was delivered to plaintiffs or to their duly constituted agent at the time of the shipment of the goods at Antwerp, still the forwarding of the bills of lading to the bankers, the indorsement thereof over to plaintiffs, and their entry thereon of the goods at the custom house, were an unequivocal ratification of the terms and conditions of a contract entered into on their behalf, the terms of which, in the absence of any evidence to show that they dissented or demurred thereto, they must be held to have assented to and accepted."

In applying the authorities to the facts in this case, it is material to consider:

1. It is not a case where a bill of lading was imposed upon an ignorant or unskilful man, which is an element in some of the decisions.

2. Although in this case there was no custom of business between the shipper and the carrier, because there had been no prior shipments, the shipper did throughout the negotiations expect and understand that he was to receive a bill of lading.

3. The bill was issued upon the shipper's application as soon as possible—as the record states, "forthwith" after the shipment—and should fairly be regarded as simultaneous with it.

4. It expressed the *usual* carrier's liability, and was in no sense an attempt to limit or lessen that liability.

5. The Trading Company assented to its terms by immediately negotiating it to the bank.

The learned Circuit Court of Appeals treated the case as if it were necessary for the carrier to show that the shipper was *estopped*, by some positive and affirmative act relied on by the carrier, to dispute the bill of lading. This is not, we submit, a correct view. The most the carrier must be held to establish in order to make the bill of lading a binding contract, is that the shipper *assented* to it. *See cases supra.*

How could he show a more unequivocal and complete assent than to prove: first, the shipper understood throughout the negotiations that a bill of lading was to be issued; second, applied for it as soon as possible after delivery of the goods; third, accepted a bill expressing the ordinary common law liability of the carrier; fourth, negotiated it at once for his benefit?

It is important that we do not in this case seek to limit by the bill of lading the common law or usual liability of the carrier, but only to show that the parties in this case made the very contract, which this court has held to conform to the ordinary and usual carrier's liability; it is stipulated in the record that the bill of lading was in the *usual* form.

It is important, too, that the shipper *requested* throughout the negotiations to secure the bill of lading. It was essential to him. He negotiated for IT. How then can it be said not to merge everything prior? How can it be held an unaccepted paper foisted upon the shipper?

We know of no authority which, upon facts similar to those in this case, applies the rule held by the court below. No decision can, we believe, be pointed out where a shipper has asked for a bill of lading in order to negotiate it, and has then negotiated it, and it has been held not a part of the contract.

The receipt for negotiation and the immediate negotiation of the bill of lading so insist constitute an *assent* to its terms, within the language

of the cases. It cannot be otherwise regarded, because the shipper secured and transferred to the bank an important right, which according to the shipper's own claim, it did not have under the preliminary negotiations, viz: the right to hold the Northern Pacific Steamship Company responsible for the transportation from Tacoma to Yokohama. The shipper placed itself and its credit in contract relations with the Northern Pacific Steamship Company. It and its vendee were in position to enforce those rights against that company. Suppose the goods had been lost at sea, the shipper and the bank would have had a right to sue the Steamship Company upon the bill of lading, and had the Receivers been insolvent can it be doubted that they would have exercised that right? So they would have certainly been required that right to sue and had the Receivers been insolvent or could the Steamship Company not have been successfully sued and had the Receivers

V.

The Collector's action in refusing to allow the boat to carry the lead, made the performance of the agreement not only impossible, *but unlawful*, and therefore absolved the carriers from the agreement to carry by that boat.

That the lead did not go by the steamer sailing October 30, was due to no fault of any carrier. The Anchor line, the initial carrier, transported it in due time to Duluth and delivered it to the Receivers; the Receivers carried it in due season to Tacoma and delivered it to the Steamship Company; and the Steamship Company loaded it aboard its vessel sailing October 30. The Deputy Collector, an officer of the United States having authority, refused to allow the ship to sail with the lead. He refused her a clearance and compelled the discharge of objectionable freight before he would issue one. The non-liability is placed upon the *illegality* of carrying out the contract, no matter what it was, or by whom made, and regardless of any provision of the bill of lading.

Probably the Deputy Collector erred. Contraband as the lead doubtless was, trade therein was

lawful. *Kent's Commentaries*, 14th ed. *142-143 and notes (c) and 1. *The Santissima Trinidad*, 7 Wheat. 283, 340; *Richardson v. Maine Ins. Co.*, 6 Mass. 102, 113; 11 *Opinions of Attorney General*, 408; *The Helen*, L. R. 1 Ad. & Ec. 1.

We apprehend that neither the Deputy Collector, nor the Collector, nor the Secretary would have done right to prevent this shipment, or detain the vessel on account thereof. But rightly or wrongly, the United States officers charged with authority did withhold the clearance, and for the ship to sail without clearance would have been an offense against the laws of the United States. R. S. 4197.

This brings the facts within the rule in the leading case of *Brewster v. Kitchell*, 1 Salk. 198, that "if H. covenants to do a thing which is lawful, and an act of Parliament comes in and hinders him from doing it, the covenant is repealed."

It is true that in the case at bar no new statute has intervened, but by the act of the Deputy Collector the sailing of the vessel with the lead became unlawful. By virtue of the statute of the United States, the Deputy Collector was able to, and did, make it unlawful to sail with the lead, and that it was so unlawful, however that came about, is a perfect excuse for not doing it. *Baily v. De Crespigny*, L. R., 4 Q. B. 180.

See *Leake on Contracts*, 710-713.

It is indeed true that a party may bind himself to do an act in such a way that a subsequent arising impossibility is no defence, but that is not this case. The rule upon that subject is laid down in *Chicago, Milwaukee & St. Paul Ry. Co. v Hoyt*, 149 U. S. 1. There Mr. Justice Jackson, for the court, said:

> "There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or pay damages for the non-performance, and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."

Applying here the rule of that opinion, it is perfectly clear that the obstruction arising from the act of an officer of the government was in nobody's contemplation. It appears that there was no prohibition by the Department during the war in question of the carriage of such goods, and claimant shipped lead from San Francisco to Yokohama at about the same time. It is evident that no one should have entertained any apprehension upon this point. Whatever doubts Fitch may have had appear from his correspondence to have referred to

whether his principal, the Steamship Company, would subject their ship to the risk of capture by Chinese cruisers. There is no probability that either party had in mind the United States Collector refusing to allow the ship to sail with the lead.

The cases cited for the claimant do not meet the point here involved. They are cases which simply lay down the general rule stated above. They do not come within the exception which the supreme court states in the passage quoted, *nor are they cases where performance became illegal*, and therefore do not apply here.

The argument for the claimant takes no account of the *nature* of the obstacle which caused the impossibility in this case, although that is the point of capital importance. Where an act which a party has agreed to do becomes *unlawful* he is released from his obligation, and this rule is fully recognized in the cases cited for appellee.

Thus, *Blight v. Page*, is reported only in a note to *Touteng v. Hubbard*, 3 B. & P., 291; in the latter case Lord Alvanley, C. J., for the court, while approving *Bright v. Page*, states the rule as follows:

> "*Where the policy of the state intervenes and prevents the performance of the contract, the party will be excused;* and so if a party who has covenanted not to do something is directed by act of Parliament to do that very thing, he is released from his covenant."

In *Barker v. Hodgson*, 3 M. & S. 270, the court said, just before the passage relied on by appellee:

> *"If, indeed, the performance of this covenant had been rendered unlawful by the government of this country, the contract would have been dissolved* on both sides, and this defendant, inasmuch as he had been thus compelled to abandon his contract, would have been excused for the non-performance of it, and not liable to damages."

The principle of the cases is that, it being the duty of the courts to enforce the laws of their country, they will never hold a party liable in damages because he has not violated them. While acts and laws of foreign governments are treated in the same way as natural occurrences, a breach of contract caused by obedience to lawful authority of the government under which the court sits, and which authority the defendant is bound to obey, will never give a right to damages. Any injury arising from the interference of government gives rise to no right of action.

This was the rule followed by the learned judge in the Circuit Court, and it is this that makes the *case of N. Y. N. H. & H. R. R. Co. v. Baker*, cited by him, in point. That decision was based upon the doctrine, that where, without the choice or will of a party, the government intervenes, the party is exonerated from the consequences of such intervention. The same principle applies here and it must produce the same result.

It is idle to say that the Deputy Collector's action was wrong and that he ought not to have done as

he did. The subject was within his jurisdiction and when he had acted his action was binding. Even more idle is it to say that the Receivers might have foreseen and provided against such action. They could not be bound to foresee that the Deputy Collector would so wrongfully act, nor to provide against his doing so. They had a right to assume proper action upon his part.

Equally without weight is the suggestion that it was incumbent on the carriers to hold the ship for the unknown and uncertain time necessary to obtain a reversal of the Deputy Collector. The ship was already one day past due when she sailed. The captain, like the captain in the case of *The Styria*, 186 U. S. 1, was obliged to act according to his best judgment in an unforseen emergency, and act for what appeared the best interest of the ship and all the owners of its freight. There is nothing in the record from which the court should infer that the captain ought to have delayed the ship in order to obtain a reversal of the Deputy Collector.

Moreover, it is not apparent that detaining the ship would have done any good. The telegram received from the Collector reads:

> "Department advises that *unless you have evidence tending to show* that the pig lead now at Tacoma * * * is to be used in the war between China and Japan, no reason is perceived why shipment should not be permitted."

From this telegram it appears that the Department was laboring under the same error as the Deputy Collector, and supposed, that if the lead

could be shown to be intended for use in the war, it should be stopped. There is little difficulty in inferring that the lead was actually intended for that use. Its remarkable drop in price at the close of the war, exhibited in the record, is suggestive. It was doubtless contraband. *Boyds Wheaton*, 3d Ed. 631, 650; *President's Proclamation of June* 13, 1864; *Scott's Cases Int. Law*, 765-6 and note; *Taylor Int. Law*, Sec. 657; *General Orders to U. S. Navy* June 30, 1898; *The Styria*, 186 U. S. 1, 14, 16. Therefore, it is not apparent that delay would have secured a clearance.

Nor is there anything in the suggestion that the Receivers were liable for not having notified the plaintiffs earlier, because as pointed out in the opinion of the Circuit Court, there is nothing to show that such notice would have saved, or given an opportunity to save, any part of the loss.

The interference of the collector has another operation. *It absolves the carriers according to the terms of the contract.* We have argued elsewhere that the bill of lading is the contract and need not repeat what is there said. As the preliminary negotiations were had with the understanding on both sides that a bill of lading in usual form would be issued, and as such bill was accepted without objection and negotiated, the engagement of Mr. Fitch that the cargo should go forward by ship, of Oct. 30, was subject to the usual terms of bills of

lading. Among those terms was the "Restraints of Princes" provision,

> "It is mutually agreed that the carrier shall not be liable for loss or damage occasioned by * * * arrest and restraint of princes, rulers or people."

The interference of the collector was most undoubtedly a "restraint of princes, rulers or people" and, unless the bill of lading is to be thrown out of the case, it is a perfect defense to the claim here made for damage to the goods arising from delay.

It cannot be disputed that this provision is ancient, usual and well approved; it, or something equivalent, is in universal use; and as experienced large shippers the plaintiff was bound to expect it in any bill of lading. The preliminary negotiations were therefore all subject to the qualification, that interference of the government would excuse delay.

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For Appellant.